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Employees' entitlement to annual leave during periods of sickness absence

There has been much litigation in recent years concerning the interaction between annual leave entitlement and sickness absence.

In the 2009 case of *Pereda v Madrid Movilidad SA [2009] IRLR 959* the ECJ held that if workers do not wish to take their holiday entitlement during a period of sick leave they are entitled to take it later even if that means it is carried over into the next leave year.

The question then arose as to how long employers should permit leave to be carried forward. In *KHS AG v Schulte [2012] IRLR 156* the ECJ considered the point and held that the carry-over period should be significantly longer than the leave year in which the entitlement had accrued and held that, in the particular case, a period of 15 months was lawful.

However it did not make clear whether 15 months should be treated as a minimum. The Advocate General (who publishes an opinion prior to a European Court judgment) had recommended 18 months, having regard to the provisions of the International Labour Convention (ILO) which allows postponement of annual leave up to 18 months after the end of the leave year in some cases. Employers were therefore left with some uncertainty as to how long to permit carry-over.

This was considered recently by the Employment Appeal Tribunal (EAT) in the case of *Plumb v Duncan Print Group Ltd.*

The case only covers the first four weeks of leave (20 days for full time staff) which derives from the Working Time Directive and does not apply to the balance of any additional holiday entitlement including the additional 8 days conferred by the Working Time Regulations 1998.

Mr Plumb was absent following an accident at work from 26 April 2010 to 10 February 2014 when his employment terminated. His employer's leave year ran from 1 February to 31 January. Mr Plumb did not take or request any holiday until September 2013 when he requested leave to take all his accrued holiday from 2010.

Applying an earlier case the Employment Tribunal considered that in order to exercise his entitlement to accrued leave, Mr Plumb must have been unable or unwilling to request leave due to his medical condition. In fact during the period of sick leave, he had continued to work at weekends and had taken a week's holiday in 2012 and his claim was rejected on this basis.

Mr Plumb appealed to the EAT arguing that sick workers are not required to show that they are unable to take annual leave in order to be entitled to carry-over such leave.

The EAT allowed Mr Plumb's appeal in respect of accrued leave for the 2012/2013 leave year but dismissed his appeal in respect of the previous two holiday years, holding that there is no principle that a worker must be able to demonstrate that they are physically unable to take annual leave in order to benefit from carried-over leave.

However Mr Plumb's entitlement to take accrued leave was subject to a time limit and he was not entitled to be paid in lieu of accrued leave for the 2010/2011 and 2011/2012 leave years because he had lost the right to take that holiday.

The EAT again referred to the ILO principles which recognise that leave must not accrue indefinitely but must be taken within 18 months of the end of the year to which it relates and this formed the cut-off point.

Permission to appeal to the Court of Appeal has been granted so this may not be the end of the story but for present purposes employers must permit workers to take untaken leave due to sickness absence within a period of 18 months of the leave year in which it accrues if the employee returns to employment.

Jane Klauber
Partner
+44 (0)20 8394 6483
Jane.Klauber@russell-cooke.co.uk